UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELTAIONS BOARD

In the Matter of:)	
)	
SOUTH METRO HUMAN SERVICES,)	Case No. 18-RC-17754
)	
Employer)	
)	
and)	
) .	
AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES)	
COUNCIL 5,)	
)	
Petitioner.)	

AFSCME COUNCIL 5'S RESPONSE TO SOUTH METRO'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATION ON CHALLENGES AND OBJECTIONS

Petitioner AFSCME Council 5 ("the Union") responds to the Exceptions to the Hearing Officer's Report and Recommendation on Challenges and Objections ("the Employer's Exceptions") filed by the Employer, South Metro Human Services, on July 1, 2011. The Hearing Officer issued the Hearing Officer's Report and Recommendation to the Board on Challenged Ballots and Objections ("the Hearing Officer's Report") on June 17, 2011.

The Employer's Exceptions focus primarily on the Hearing Officer's recommendation that two ballot challenges be sustained. Those ballots were cast by Samantha Hofmaster and Cindy Van Heise. The election was in a professional bargaining unit, and the Hearing Officer found that Hofmaster and Van Heise were not professional employees within the meaning of the National Labor Relations Act. The Hearing Officer correctly analyzed the evidence in the record regarding their duties and responsibilities, and applied the criteria for professional employees.

Accordingly, the Union respectfully requests that the Board deny the Employer's exception regarding these ballot challenges.

The Employer also filed exceptions to various factual determinations, though not to the Hearing Officer's related recommendations. These exceptions also lack merit. The factual determinations were based on the evidence in the record, and the Union respectfully requests that the Board deny these exceptions.

Response to Employer's Exception 1: The Hearing Officer Correctly Found that the Ballots of Samantha Hofmaster and Cindy Van Heise Should Be Sustained.

Samantha Hofmaster and Cindy Van Heise both have the job titles of Mental Health Counselor II ("MHC II"). The Employer's job description for the MHC II position states that a bachelor's degree in a mental health field is required, but Hofmaster and Van Heise do not have this degree. (Exs. 18, 20, 21.) The Mental Health Counselor I ("MHC I") position does not require a bachelor's degree. (Ex. 17.) Both MHC Is and MHC IIs work in Adult Foster Care ("AFC") homes with patients that have mental health issues; MHC Is work in Level I homes, while MHC IIs work in Level II homes. The Employer has argued that MHC Is should be in the non-professional unit, and MHC IIs in the professional unit. The evidence presented at the hearing, however, showed that MHC IIs are not professionals within the meaning of the Act.

The Employer argues that the issue of whether MHC IIs belong in the professional unit "was settled at the time the parties stipulated to the Election Agreement." But the parties did not stipulate that MHC IIs, or any other category of employees, were MHC IIs. The Election Agreement only states that the unit comprises professional employees; it excludes certain job classifications such as M.D.s, and says nothing about MHCs, whether Level I or II.

Rather than address whether MHC IIs are professionals, the Hearing Officer's Report focuses on whether Hofmaster and Van Heise are professionals. After carefully considering the

evidence presented, the Hearing Officer correctly concluded that Hofmaster and Van Heise are not professional employees within the meaning of the Act.

a) The Employer Prefers, but Does Not Require, that MHC IIs Have a Bachelor's Degree.

Deborah Wendle, the Human Resources recruiter testified regarding the qualifications for the MHC II position:

- Q. Does this position require a bachelor's degree?
- A. Preferred, yes.

(Tr. 117:16-17.) Wendle later did refer to a bachelor's degree as a "requirement," but even then acknowledged she'd waived the "requirement" for approximately twenty people, and possibly more. (Tr. 136:6-8.) There was no evidence that the Employer required that those twenty or more people have any particular level of experience before being hired.

Even if experience can in some way substitute for the bachelor's degree, the Employer failed to provide evidence that Hofmaster and Van Heise had the required experience. The Employer cites to the testimony of Deborah Wendle, Human Resources Recruiter, to support its assertion that Hofmaster and Van Heise have more than 6,000 hours of experience working with severely and persistently mentally ill individuals. But Wendle did not testify that either of them had that kind of experience. She made general statements that they had a lot of experience but did not quantify it. (Tr. 120-21.) Hofmaster and Van Heise's resumes also do not indicate how many hours of experience they have. (Exs. 20, 21.) Thus, although the Employer frequently refers to the 6,000 hour requirement in the statutory and regulatory framework, there was no evidence in the record that Hofmaster and Van Heise's experience crossed this threshold.

The Employer argues that MHC IIs must be presumed to require knowledge of an advanced type because most MHC IIs have a bachelor's degree. But, as discussed below, MHC IIs' duties are remarkably similar to those of MHC Is, who are not required to hold a bachelor's

degree. In fact, MHC Is without bachelor's degrees routinely work as MHC IIs when they cover shifts in Level II houses during all times of day or night, regardless of the qualifications of the other counselors on duty at the time. The lack of a bachelor's degree is evidently not a problem, as the Employer regularly permits this shift coverage. Further, MHC IIs' independent judgment and discretion are so circumscribed that advanced knowledge is not necessary. The Employer minimizes the importance of the bachelor's degree in determining whether Hofmaster and Van Heise are professionals, but then trumpets the fact that most MHC IIs do have the degree, and argues that if most of the MHC IIs have advanced knowledge, the job must require it. This leap in logic elides the clear showing in the record that the MHC IIs' duties and responsibilities do not require advanced knowledge and do not satisfy the criteria for professional employees.

b) Ms. Hofmaster and Ms. Van Heise's Duties Are Not Intellectual and Varied in Character, and Do Not Require the Consistent Exercise of Professional Discretion and Judgment.

The record established that MHC Is and MHC IIs' duties and responsibilities are similar enough that they should be in the same bargaining unit. The only difference between MHC Is and MHC IIs are the facilities in which they regularly work. But again, MHC Is frequently work in Level II facilities. Further, the duties of the MHCs are essentially the same, regardless of the facility. In both facility levels, MHCs have detailed treatment plans and protocols that dictate both how patients should be treated on typical days, and in special circumstances that may arise. In both facilities, MHCs exercise oversight of clients, supervise clients, administer medications, help clients manage mental health symptoms, bring clients to appointments, provide referrals, make food, take clients on activities in the community, and work through crisis situations. (Tr. 354:6-19.)

Both MHC Is and MHC IIs must work with patients that may experience crises on any given day, and neither may exercise independent judgment and discretion in these situations. Juli

Schimp, Program Director of the AFC program, acknowledged that a crisis could arise in a Level I house that is similar to a crisis in a Level II house. (Tr. 370:12-14.) The Employer provided no evidence of any crisis that has arisen, or could arise, in a Level II facility, but not a Level I facility. Both MHC Is and IIs must follow the treatment plans and protocols and consult the on-call Mental Health Professional if a crisis arises. (Tr. 157:15-22, 546:5-7, 557:12-14.) The Employer acknowledges that the law requires it to have these documents, but attempts to minimize their importance, labeling them "perfunctory." These documents are not perfunctory, and the Employer has refused in the past to give the MHC IIs more latitude in particular situations. Whatever gaps the treatment plans and protocols may leave are filled in by the on-call Mental Health Professionals, drastically limiting the potential for MHC IIs to exercise any independent judgment and discretion.

c) The Hearing Officer Gave Proper Weight to Ms. Hofmaster and Ms. Van Heise's Failures to Develop Client Treatment Plans.

The Hearing Officer gave appropriate weight to the fact that MHC IIs do not develop client plans. This fact is relevant to the determination that Hofmaster and Van Heise do not exercise independent judgment and discretion. Although the Employer now argues that MHC IIs, are responsible for continually assessing the plans' effectiveness and recommending changes to the treatment plans, the Employer failed to introduce any evidence of this role. In fact, the record showed that if a change in a treatment plan was necessary, the on-call supervisor or another individual would make that determination, not the MHC II. (Tr. 157:19-22; 557:12-14.) The Employer cites to testimony from Juli Schimp and Terry Schneider, Director of Clinical Services, in support of its assertion that the MHC IIs assess the effectiveness of the treatment plans or recommend changes, but their testimony does not support the Employer's argument. Schimp testified that the treatment plans are reviewed at quarterly meetings, but there was no

indication that the MHC IIs played any role in this review. (Tr. 360-61.) She did, however, explicitly state that MHC IIs typically do not "have any role in developing" treatment plans, and only follow the plans. (Tr. 361:3-4.) Schneider's testimony was less clear, but still does not support the assertion that MHC IIs play any role in assessing the effectiveness or recommending changes to the treatment plans.

- Q. ... [B]ut can you think of in your practice with South Metro a time when a mental health counselor II would have to exercise discretion and independent judgment in applying a treatment plan?
- A. Certainly. The mental health practitioners also, a number of them are going to be involved in doing other kinds of assessments. So, again, the final product may already be approved by a mental health professional. But they may be getting information about the person's chemical use history. There needs to be discretion in how you ask a person about their chemical use history. So they're going to be exercising discretion then on a rather routine basis when doing some of those assessments.
- O. The mental health counselor II would be?
- A. All of all of them would be.
- Q. When you say "all of them," does that include, is that the same for mental health counselor I?
- A. Yes.

(Tr. 565:18-566:12.) Asking for a chemical use history was the only example the Employer provided of MHC IIs supposedly exercising any independent judgment or discretion with respect to the treatment plan. It is unclear though what job classifications Schneider was referring to: mental health practitioners, MHC Is, or MHC IIs. Even if Schneider meant that MHC IIs exercised independent judgment and discretion by getting information about a person's chemical use history, he acknowledged that the MHC Is do the same thing, and the Employer has taken the position that MHC Is are not professionals. Thus, the Employer has not pointed to *any* evidence

that Level II counselors exercise any independent judgment or discretion in any way that distinguishes them from employees that are not professional.

Moreover, asking for a chemical use history is not the same as making a judgment or even observation about the effectiveness of a treatment plan. This failure to develop client plans is one of the reasons the Hearing Officer found that the MHC IIs do not exercise independent judgment and discretion based on Board law. The cases relied upon by the Hearing Officer demonstrate the kind of independent judgment and discretion professional employees in the mental health field exercise. In Catholic Bishop of Chicago, the social workers provided counseling services, prepared case reports, and were qualified to provide therapeutic treatment. 235 NLRB 776, 780 (1980). At SMHS facilities, professional employees such as mental health practitioners and case managers carry out such duties, devising treatment plans that MHC Is and IIs follow. Following these directions, the MHCs are more like the social workers in Samaritan Health Services, whose activities were "routine or closely supervised." 238 NLRB 629, 640 (1978). The MHCs' tasks are described in detail in the various protocols or plans they must follow, and when deviation from these plans is necessary, the MHCs are required to consult the on-call supervisor, who will provide instruction. The record, therefore, shows that MHC IIs are more similar to the non-professional employees in Catholic Bishop of Chicago than the professional employees in Samaritan Health Services.

d) MHC IIs Do Not Exercise Independent Judgment and Discretion as to Either Administrative or Clinical Tasks.

The Employer's exception that the Hearing Officer failed to distinguish between administrative burdens and clinical tasks has no merit. The record showed that the MHC IIs may not exercise independent judgment or discretion when discharging any duties, whether they be

administrative or clinical. In both instances, they must follow strict instructions that are either written out in advance or provided by an on-call supervisor:

- Q. What is it that a Mental Health Counselor can do in their job without having to consult an on call Mental Health Professional?
- A. My understanding of what a Mental Health Counselor II can do without consulting either the on call Mental Health Professional or a lead person at their site is basically nothing. . . .
- Q. Well I mean I'm a little bit confused by that. I mean they interact with people all shift long, don't they? What are they doing?
- A. Well there's strict documents outlining treatment plans, vulnerability plans, things like that, and those are not documents that are created by the Mental Health Counselors.

(Tr. 167:7-22.) The Employer does not dispute that the MHC IIs must obtain permission before making administrative decisions, such as paying cab fare. But it also does not provide any examples of the MHC IIs making their own decisions with respect to a patient's clinical care, without following the instructions provided in detailed plans and protocols, or provided by a supervisor. Therefore, the Employer's exception that the Hearing Officer improperly conflated administrative burdens with limitations on MHC IIs' professional judgment and discretion is without merit.

e) The Record Did Not Establish that the Employer Sufficiently Distinguishes Between the MHC I and MHCI II Classifications.

The Employer's Exceptions portray the MHC I and MHC II classifications as wholly distinct from each other, but the record showed a remarkable degree of overlap between them. The labels MHC I and MHC II stem from the facility levels the counselors work in, at least in theory: MHC Is work in Level I houses, and MHC IIs work in Level II houses. In practice, however, MHC Is frequently cover shifts in Level II facilities. There are no limitations on when

MHC Is may cover such shifts. They may do so during day or night. They may work in a Level II house regardless of education or experience; Laura Phelps, who does not have a four-year degree, was initially hired to work the overnight shift at a Level I house. (Tr. 57:23-58:4.) They may also work a shift in a Level II house when the other counselor on duty must leave the facility to attend to a patient need, such as going on an appointment. (Tr. 401:7-18.) Even though there are no limitations on when an MHC I may work in a Level II house, when an MHC I covers these shifts, the MHC I is expected to act exactly as an MHC II would, following all the same protocols and plans, and attending to the same patients. (Tr. 58:13-16, 399:16-20.) In sum, the Employer's exceptions omit mention of all the ways MHC Is are similar to MHC IIs, while the record shows that the differences the Employer emphasizes exist more on paper than in practice.

f) The Record Did Not Establish that MHC Is and MHC IIs' "Crisis Duty Responsibilities" Differ Significantly.

Crises may arise in both Level I and II houses. The Employer argues now that the crises in a Level I house differ in frequency and nature from the crises in a Level II house, citing to the testimony of Juli Schimp. But Schimp stated that a crisis in a Level I house could be similar to a crisis in a Level II house and that the difference was frequency:

- Q. In situations, could a crisis arise in a level I house that is similar to a crisis in a level II house?
- A. Not as frequently. It could.
- A. They could.
- A. But it's not it happens more often in a II house.

(Tr. 370:12-16.) And although she stated that MHC Is do not encounter the same situations that require "clinical judgment" in a Level I house, MHC Is do frequently work in Level II houses,

where they would encounter the same situations as any MHC II and be expected to respond appropriately. Thus, even if there is a difference in the clinical situations in the Level I and Level II houses, MHC Is do encounter the more severe situations when they work in the Level II houses, which they may do without limitation.

Response to Employer's Exception 2: The Hearing Officer Properly Referred to the Community Foundations Schedules as "Schedules."

The Hearing Officer did not erroneously refer to Community Foundations ("CF")¹ facilities' phone lists as schedules. The Employer's Exceptions state:

As the Hearing Officer concluded, these so-called schedules "do not establish permanence or regularity inconsistent with [challenged employees'] on-call status." (Report, p. 8.)

(Employer's Exceptions, 15.) But in that quotation, the Hearing Officer was referring to the schedules in Exhibit 7, which is for the CF facilities. The preceding sentences discuss Robin Nadeau and Lindsay Paetznick, who work in CF facilities. The "phone lists" the Employer is referring to pertain to the AFC Facilities. (Tr. 389-90 (Olson testifying regarding AFC phone list); Tr. 210 (Lowe describing her role in preparing AFC phone lists); Tr. 478-79 (Schultz testifying regarding Ex. 17, an AFC phone list).) The CF schedules at Exhibit 7 are, in fact, schedules and there is no evidence or argument in the record to the contrary. The Employer's exception appears, therefore, to confuse the CF schedules at Exhibit 7 with the AFC documents.

Response to Employer's Exception 3: If On-Call Employees Are Found Eligible to Vote, No New Election Will Be Necessary.

The Union has filed exceptions to the portion of the Hearing Officer's Report recommending sustaining the challenges to on-call employees' ballots. If the Board rejects the

¹ Community Foundation is an intensive residential treatment services program. (Tr. 469:14-17.)

challenge, and orders that the challenged voters' ballots be opened, no new election will be necessary.

The "disenfranchisement" cases the Employer relies on in its contingent exception are inapposite. In that line of cases, employees were, for various reasons physically unable to vote. *NLRB v. Superior of Missouri, Inc.*, 351 F.3d 805, 808 (8th Cir. 2003) (collecting cases). For example, in *Yerges Van Liners*, 162 NLRB 1259 (1967), an employee was unable to vote because he was traveling to make a delivery. In *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956), employees were unable to vote because they were working away from the plant during the entire time the election was conducted. In *Baker Victory Services*, 331 NLRB 1068 (2000), severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote. Those cases are all different from this case, where there is no allegation that eligible voters were physically prevented from voting.

Rather, the issue in this case is that if the Board finds that on-call employees were eligible to vote, the outcome will be that some employees that were eligible to vote did not do so. This outcome would not be the result of objectionable conduct by the Union. Rather, if on-call employees believed they were ineligible to vote, it is likely because the Employer told them they were ineligible.

Where a party to an election, through its own action, negligence, or good-faith mistake, has prevented an eligible employee from voting, only the other, non-acting party has any foundation for an objection based on a breakdown in the Board's processes. To hold otherwise would invite abuse of both the Board's election procedures and the postelection objection process.

Berryfast, Inc., 265 NLRB 82 (1982). Thus, the election should not be set aside based on the Employer's objection that on-call employees did not vote, when it was the Employer's own

conduct that caused the on-call employees to believe they were ineligible to vote. *George Washington Univ.*, 346 NLRB 155, 155 (2005), enfd. 181 LRRM (BNA) 3024 (D.C. Cir. 2006).

Response to Employer's Exception 4: The Hearing Officer Correctly Summarized the Record with Respect to Wage Increases.

The Hearing Officer correctly summarized the testimony of the employees who discussed wage increases. Asked if Tom Paul had told him why he was receiving a raise, Robert Radspinner responded, "I don't particularly remember why." (Tr. 10:8-10.) He also said it sounded like there was money in the program that allowed for raises, but this vague recollection that the Employer had money cannot reasonably be interpreted as understanding why the Employer was choosing to use whatever funds were available to provide wage increases. Brian Nolan, another employee, gave a similarly vague response when asked if Paul had explained why the Employer was providing a wage increase: "I don't remember his exact words. What I remember taking away from that is that they had evaluated and made a decision to increase the salary. I'm not sure exactly why." (Tr. 460:23-461:2.) He understood that the decision was made after the Employer reviewed year-end reports, but again, this cannot be interpreted as understanding why the Employer decided to use any funds it had on wage increases. Thus, the Hearing Officer accurately summarized Radspinner and Nolan's testimony that they did not know why the Employer increased their wages.

The Hearing Officer also found that the Employer's past practice with regards to wage increases has been mixed. Specifically, the past practice that did not support the Employer's position is that there were increases based on unexplained factors, and that the Employer did not present evidence that the base wage rate increase was based on selected programs' specific performance. Terry Schneider testified that the programs have separate funding streams, and that there are different points in the programs when wage increases have been given. (Tr. 236:7-11.)

This vague testimony does not contradict the Hearing Officer's Report. Tom Paul's testimony

was similarly vague as to the reason for wage increases outside of anniversary dates or cost of

living adjustments: "Well, what I'm saying is there are other increases other than anniversary

increases and that those are discretionary by the Company to try and improve conditions." (Tr.

338:11-13.) This testimony also does not contradict the Hearing Officer's finding that the

Employer's increases have been based on unexplained factors, and that there was no evidence

that program increases were based on the programs' specific performance. Accordingly, there is

no merit in the Employer's exception to the Hearing Officer's Report with respect to the wage

increases.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board deny the

Employer's Exceptions to the Hearing Officer's Report and Recommendation on Challenges and

Objections.

Dated: July 8, 2011

GREGG M. CORWIN & ASSOCIATE

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CERTIFICATE OF SERVICE

I, Cristina Parra Herrera, certify that on July 8, 2011, I caused AFSCME Council 5's Response to South Metro's Exceptions to the Hearing Officer's Response and Recommendation on Challenges and Objections to be served on the following named individuals via electronic mail and also putting same in the United States mail with proper postage affixed there to:

Marlin O. Osthus Regional Director National Labor Relations Board, Region 18 330 South Second Ave., Suite 790 Minneapolis, MN 55401-2221 marlin.osthus@nlrb.gov

Mark S. Mathison Gray Plant Mooty 500 IDS Center 80 South Eighth Street Minneapolis, MN 55402 mark.mathison@gpmlaw.com Dated: July 8, 2011

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